

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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**GARY GILLARD,**

**Plaintiff,**

**-V-**

**9:09-CV-0860**

**MICHAEL ROVELLI, et al.,**

**Defendants.**  
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APPEARANCES:

GARY GILLARD  
01-A-1613  
Attica Correctional Facility  
Box 149  
Attica, NY 14011  
Plaintiff, *Pro Se*

HON. ANDREW CUOMO  
Attorney General of the State of New York  
ROGER W. KINSEY, ESQ., Assistant Attorney General  
The Capitol  
Albany, New York 12224  
Counsel for Defendants

**Hon. Norman A. Mordue, Chief U.S. District Judge:**

**ORDER**

The above matter comes to this Court following a Report-Recommendation (Dkt. No. 82) by Magistrate Judge George H. Lowe, duly filed on the 29th day of September 2010. On October 18, 2010, the Court granted plaintiff's letter motion (Dkt. No. 83) and extended plaintiff's time to object until November 18, 2010. No objection has been submitted. After careful review of all of the papers herein, including the Magistrate Judge's Report-Recommendation, and no objections submitted thereto, it is hereby

ORDERED that the Report-Recommendation (Dkt. No. 82) is hereby adopted in its entirety;

ORDERED that Defendants' motion to dismiss for failure to state a claim (Dkt. No. 42) is GRANTED IN PART AND DENIED IN PART; and it is further

ORDERED that the following claims are dismissed with prejudice: (1) the Eighth Amendment medical claim against Defendant Nesmith; (2) the claim against Defendant McAllister; (3) any claim that Defendants Rovelli, Deluca, Lindemann, and Silverberg violated Plaintiff's constitutional rights simply by threatening him; (4) the claim against Defendant Holland; (5) any claims for damages against Defendants in their official capacities; and (6) the pendent state law claims; and it is further

ORDERED that Defendants McAllister and Holland are hereby terminated as Defendants; and it is further

ORDERED that the following claims are dismissed without prejudice: (1) the Eighth Amendment medical claims against Defendants Collins, Lindemann, Labrum, and Silverberg; (2) the claims against Defendants Fischer, Roy, David Rock, Heath, and Nabozny; and (3) the conspiracy claims; and it is further

ORDERED that if plaintiff wishes to amend his complaint as to the Eighth Amendment medical claims against Defendants Collins, Lindemann, Labrum, and Silverberg; the claims against Defendants Fischer, Roy, David Rock, Heath, and Nabozny; and the conspiracy claims, he may do so by serving and filing an amended complaint within 60 days, that is, on or before January 24 2011, and if he does not do so, such claims will automatically be dismissed without further order of the Court, and Defendants Collins, Lindemann, Labrum, Silverberg, Fischer, Roy,

David Rock, Heath, and Nabozny will be terminated as Defendants; and it is further

ORDERED that if plaintiff amends his complaint, the amended complaint will completely replace the initial complaint, and any claims from the initial complaint that are not set forth in the amended complaint will be deemed abandoned; and it is further

ORDERED that on March 25, 2011, or within 60 days of receipt of an amended complaint, whichever first occurs, Defendants shall serve an answer as follows: answering the amended complaint if one is served; or if no amended complaint is served, answering the remaining claims of the initial complaint, that is, (1) the Eighth Amendment medical care claim against Defendant Leos, and (2) the following claims, which were not addressed by the motion to dismiss: (a) the retaliation claims against Defendants Smith, Besson, Kelly, Foster, Flores, Shattuck, Rovelli, Hoy, and Deluca; (b) the excessive force claim against Defendants Rovelli, Deluca, Flores, Shattuck, Fraser, Hoy, Foster, and Nesmith; and (c) the Eighth Amendment conditions of confinement claims regarding issues with Plaintiff's food; and it is further

ORDERED that Plaintiff's motion for summary judgment (Dkt. Nos. 72 and 77) is DENIED.

IT IS SO ORDERED.

November 23, 2010  
Syracuse, New York

  
Norman A. Mordue  
Chief United States District Court Judge